
KARPAL SINGH & ANOR.**v.****PUBLIC PROSECUTOR**

SUPREME COURT, KUALA LUMPUR

ABDUL HAMID OMAR LP

AJAIB SINGH SCJ

MOHD. JEMURI SERJAN SCJ

[SC CRIMINAL REFERENCE NO. 06-2-90]

24 JUNE 1991

CRIMINAL PROCEDURE: *Reference of question of law to Supreme Court - General and inherent power of Court of first instance to strike out frivolous proceedings - Oppression and prejudice - Delay - Discretion of Attorney-General - Applicability of English law - Abuse of process - Intention of Legislature - Meaning of "all that evidence" - Proper remedy for aggrieved persons - Circumstances under which Courts can exercise inherent powers - Miscarriage of justice - Constitutional limits - Nolle prosequi - Criminal Procedure Code, ss. 5, 173. - Courts of Judicature Act 1964, s. 66 - Federal Constitution Article 145(3).*

The applicants K and P, were charged with separate offences under the Police Act (the Act) alleged to have been committed on 30 August 1984. At the hearing in 1987, the applicants preliminarily objected that as a result of delay, the proceedings amounted to oppression and that the prosecution was oppressive and repugnant to good administration of justice. It was contended that the Court's general and inherent power to protect an abuse of process must include a power to safeguard an accused person from oppression or prejudice. The applicants requested for the proceedings to be struck out.

The Magistrate ruled that there was no provision in the Criminal Procedure Code, CPC, which empowered the Court to strike out the proceedings on the grounds submitted by the applicants. The applicants referred the matter to the High Court for revision; the High Court Judge found no merit in the submission of the applicants and remitted the case back to the Magistrate for hearing. The applicants then referred a point of law to the Supreme Court under s. 66 of the Courts of Judicature Act 1964. The prosecution contended that there was no oppression or harassment on the part of the prosecution and said that the delay was due to the setting aside of the warrant of arrest which led to an appeal in the Supreme Court and the detention of the applicants under the Internal Security Act. It was also submitted by the prosecution that the Magistrate did not have an inherent power under the law to strike out proceedings and that as the discretion of the Public Prosecutor to prosecute is absolute, the Court is not entitled to deny the prosecutor this right.

The issue for the Court was whether a Court of first instance in criminal proceedings has the power, inherent or otherwise, to strike out proceedings against an accused person on grounds of oppression and/or harassment.

Held:

[1] The unfettered discretion of the Attorney General, under art. 145(3) of the Constitution, to institute, conduct or discontinue any proceedings for an offence, other than proceedings in the Syariah Court, is a discretion which cannot be challenged and substituted by that of the Court's.

- a** [2] (a) Under s. 5 of the CPC, the English law relating to criminal procedure can only be applied when there does not exist any special provision on the matter either in the CPC or any other existing law;
- (b) section 173 of the CPC stipulates the whole procedure in summary trials in the subordinate Courts and the words “all such evidence” in s. 173 of the CPC should be interpreted broadly - it should not be confined to evidence which is available to the prosecution but which could not be produced for unavoidable reasons at the hearing, but should include evidence which can be produced at the continued hearing of the trial on a future occasion.
- b**
- c** [3] There is no provision in the CPC for striking out proceedings or acquittal without hearing all the evidence which the prosecution has to offer, even though postponements are needed. It is absurd and against common sense to believe that the Legislature expected members of subordinate judiciary to exercise such vast powers and to trespass into the Public Prosecutor’s area.
- d** [4] If any party feels that the charge and consequent proceedings are illegal on the face of the record, his remedy is to commence appropriate proceedings before a High Court to quash the charge and the proceedings by producing evidence which will satisfy the trial Judge; alternatively an aggrieved party may make appropriate representations to the Public Prosecutor for redress against alleged illegality.
- e** [5] The English doctrine of inherent jurisdiction is not applicable in subordinate Courts and there is no room for transplantation of any English practice or other systems of law in the Magistrate’s Court under the CPC; however, the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused.
- [6] In matters like criminal law which are of a purely domestic nature, the Court will only exercise inherent powers when there is miscarriage of justice and the Court must not make a decision which is in conflict with the intention of the Legislature as indicated in statutory powers.
- f** [7] The Court does not have a general inherent power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings.
- g** [8] In this case, it is clear that the prosecution did not contribute to the delay nor did the Attorney-General or the prosecution act in a spirit of harassment against the accused at all; there are also no circumstances whereby the issues of *autrofois* acquit or convict and estoppel arose.
- h** [9] However, the Court’s decision in this case should not be interpreted as limiting the constitutional function of the Courts. This was because the reference in this case was worded in very vague and ambiguous terms; it was also not specified what was meant by the term “Court” and neither was it clear why other prerogative remedies were omitted nor at what stage the applicants expected the Court to exercise its powers.
- [10] The Courts will not abdicate their responsibility to act as a watchdog within constitutional limits to ensure that any authority does not act *ultra vires*. In cases of obvious abuses or other forms of material defects, the High Court possesses the powers to do right and undo wrong in the course of administration.
- i**

[11] In this case, there is in law, no obstacle for the case against the accused to be continued in a normal manner; however, under the particular circumstances of this case, the Attorney-General may consider exercising his discretion to enter a *nolle prosequi* in view of the delay and other circumstances.

[Order accordingly.]

[Bahasa Malaysia translation of headnote]

PROSEDUR JENAYAH : Rujukan soalan undang-undang kepada Mahkamah Agung - Kuasa am yang sedia pada ada Mahkamah rendah untuk membatalkan prosiding remeh temeh - Penindasan dan prasangka - Kelewatan - Budibicara Peguam Negara - Penerimaan undang-undang Inggeris - Penyelewengan kuasa - Matlamat dan tujuan Akta - Makna "all that evidence" - Remedi tepat untuk pihak yang tidak setuju dengan keputusan - Keadaan dimana Mahkamah boleh melaksanakan kuasa sedia ada - Salah laksana keadilan - Kebatasan perlembagaan - Nolle prosequi - Kanun Prosedur Jenayah, ss. 5, 173 - Akta Mahkamah Kehakiman 1964, s. 66 - Perlembagaan Persekutuan, Perkara 145(3).

Kedua-dua pemohon dalam kes ini, K dan P, telah didakwa di bawah Akta Polis 1967 dimana kesalahan itu telah berlaku pada 30 Ogos 1984. Pada perbicaraan mereka pada tahun 1987, kedua-dua pemohon telah mengemukakan bantahan permulaan atas sebab bahawa kelewatan tindakan Pendakwa Raya mendakwa merupakan satu penindasan. Mereka berhujah bahawa sekiranya Pendakwa Raya dibenarkan meneruskan pendakwaannya ini tidak sejajar dengan matlamat keadilan. Pemohon berpendapat bahawa kuasa am yang sedia ada pada Mahkamah untuk memastikan bahawa tidak ada penyelewengan kuasa meliputi kuasa untuk melindungi tertuduh daripada penindasan atau prasangka. Seterusnya, kedua-dua pemohon memohon untuk pembatalan prosiding ini.

Majistret telah memutuskan bahawa Kanun Prosedur Jenayah (KPJ) tidak memberi kuasa kepada Mahkamah untuk membatalkan prosiding berdasarkan alasan yang dikemukakan oleh pemohon. Justerunya, pemohon telah merujuk perkara ini kepada Mahkamah Tinggi untuk penyemakan. Mahkamah Tinggi juga berpendapat bahawa tidak ada merit dalam penghujahan pemohon dan memerintah Majistret untuk meneruskan perbicaraan.

Kedua-dua pemohon kemudiannya merujuk satu isu undang-undang kepada Mahkamah Agung di bawah s. 66 Akta Kehakiman 1964. Pihak Pendakwa Raya berhujah bahawa tidak ada penindasan atau gangguan (harassment) dalam kes ini kerana kelewatan pendakwaan berpunca dari tindakan pemohon P untuk mengenyepikan waran tangkap yang dikeluarkan terhadapnya (yang telah dirayu sehingga Mahkamah Agung) dan juga kerana kedua-dua pemohon telah ditahan di bawah Akta Keselamatan Dalam Negeri.

Pendakwa raya juga berhujah bahawa Majistret tidak mempunyai kuasa sedia ada di bawah undang-undang untuk membatalkan prosiding; berasaskan fakta bahawa budibicara pihak pendakwa untuk mendakwa seseorang adalah kuasa mutlak, Mahkamah tidak berhak untuk menahan Pendakwa Raya daripada melaksanakan tugasnya.

Isu untuk pertimbangan Mahkamah Agung ialah sama ada Mahkamah rendah (Court of first instance) mempunyai kuasa untuk membatalkan prosiding atas sebab penindasan atau gangguan.

a Diputuskan:

[1] Budibicara mutlak Peguam Negara dibawah Perkara 145(3) Perlembagaan Persekutuan, sama ada untuk memulakan, meneruskan dakwaan atau sebaliknya, selain daripada prosiding didalam Mahkamah Syariah, merupakan budibicara yang tidak boleh dicabar atau digantikan oleh budibicara Mahkamah.

b [2] (a) Di bawah s. 5 KPJ, undang-undang Inggeris hanya boleh digunakan apabila perkara yang dipertikaikan tidak disyaratkan dalam KPJ atau mana undang-undang lain yang berkuatkuasa pada masa tertentu;

(b) seksyen 173 KPJ memperuntukan semua prosedur berkaitan dengan perbicaraan terus (summary trial) dan perkataan "all that evidence" di dalam s. 173 mest diberi tafsiran luas - tafsiran ini tidak boleh dihadkan kepada keterangan yang sedia ada kepada pihak pendakwaan yang tidak dapat dikemukakan semasa perbicaraan untuk sebab-sebab yang tidak boleh dielakkan, tetapi mesti meliputi keterangan yang boleh dikemukakan pada perbicaraan yang akan disambungkan pada masa akan datang.

c [3] KPJ tidak membuat peruntukan untuk pembatalan prosiding atau pembebasan seorang sebelum mendengar semua keterangan yang dapat dikemukakan oleh pihak pendakwa, dan penangguhan kes tidak menjejaskan syarat ini. Tidaklah menjadi tujuan atau matlamat Parlimen untuk membenarkan Mahkamah rendah melaksanakan kuasa luas yang telah diberi kepada pihak Pendakwa Raya.

d [4] Sekiranya sesuatu pihak berpendapat bahawa tuduhan atau pendakwaan tidak betul atau tidak adil, pihak tersebut boleh merayu atau merujuk perkara tersebut ke Mahkamah Tinggi untuk memansuhkan (quash) tuduhan atau dakwaan yang berkenaan atau sebaliknya pihak berkenaan boleh mengemukakan aduan kepada Pendakwa Raya.

e [5] Doktrin kuasa sedia ada yang disyaratkan oleh undang-undang Inggeris tidak boleh digunakan oleh Mahkamah Rendah dan di bawah KPJ, tidak ada peruntukan yang membenarkan penerimaan undang-undang Inggeris atau sistem perundangan negara yang lain; walau bagaimanapun, Mahkamah Tinggi boleh melaksanakan kuasa prerogatifnya untuk keadilan dan untuk perlindungan tertuduh.

f [6] Berkaitan dengan perkara seperti undang-undang jenayah yang merupakan undang-undang tempatan, Mahkamah hanya akan melaksanakan kuasa sedia adanya apabila terdapat salah laksana keadilan; Mahkamah tidak boleh membuat keputusan yang akan bercanggah dengan tujuan Parlimen yang terkandung dalam Akta.

g [7] Mahkamah tidak mempunyai kuasa sedia ada untuk membatalkan prosiding yang remeh temeh atau menangkis penyalahgunaan kuasa terhadap tertuduh.

[8] Dalam kes ini, adalah jelas bahawa pihak pendakwa tidak bertanggungjawab ke atas kelewatan untuk meneruskan perbicaraan tersebut; pihak Peguam Negara dan pendakwaan juga tidak bertindak untuk mengganggu tertuduh. Fakta di dalam kes ini tidak menimbulkan kedudukan isu *autrefois acquit* atau *convict* atau *estoppel*.

h [9] Keputusan Mahkamah di dalam kes ini tidak patut dianggap sebagai satu keputusan yang menghadkan kuasa Mahkamah yang disyaratkan oleh Perlembagaan untuk melindungi seseorang tertuduh daripada penindasan. Ini adalah kerana rujukan yang dibuat di dalam kes ini tidak jelas atau tepat; tidak di jelaskan apakah yang dimakna oleh perkataan "Mahkamah" dan juga tidak jelas mengapa remedi prerogatif yang lain tidak di pakai atau di peringkat manakah Mahkamah mesti melaksanakan kuasanya.

i

[10] Mahkamah akan terus menjalankan tanggungjawabnya untuk memastikan bahawa tidak ada pihak yang bertindak dengan tidak adil atau bertindak *ultra vires*. Di dalam kes dimana penyalahgunaan kuasa jelas dilihat, atau terdapat kecacatan yang material, Mahkamah Tinggi mempunyai kuasa untuk membetulkan yang salah.

[11] Di dalam kes ini, pihak pendakwa boleh meneruskan pendakwaan terhadap kedua-dua pemohon, tetapi memandangkan keadaan kes ini yang melibatkan kelewatan dan fakta-fakta lain, Peguam Negara boleh melaksanakan budibicaranya untuk mengeluarkan arahan “*nolle prosequi*”.

[Perintah sewajarnya.]

Cases referred to:

Chu Chee Peng v. PP [1973] 2 MLJ 35

Connelly v. DPP [1964] 2 All ER 401

DPP v. Humphrys [1976] 2 All ER 497

Long bin Samat v. PP [1974] 2 MLJ 152

P. Patto v. Chief Police Officer, Perak & Ors. [1986] CLJ (Rep) 208

PP v. Datuk Harun bin Haji Idris & Ors. [1976] 2 MLJ 116

PP v. Lee Tin Bau [1985] 1 MLJ 388

PP v. Zainuddin [1986] CLJ (Rep) 232

Poh Cho Ching v. PP [1981] CLJ (Rep) 229

R. v. London Sessions (Chairman), Ex p. Downes [1953] 37 Cr App Rep 148

Legislation referred to:

Courts of Judicature Act 1964, s. 66

Criminal Procedure Code, ss. 5, 173(c), (f), (g), 376

Federal Constitution, art. 145(3)

Police Act 1967, ss. 27(2), (5)(a), (8)

For the applicants - Karpal Singh; M/s. Karpal Singh & Co.

For the respondent - Stanley Isaacs, DPP

JUDGMENT

Abdul Hamid Omar LP:

This is a reference under s. 66 of the Courts of Judicature Act 1964 pursuant to leave granted to the applicants Mr. Karpal Singh and Mr. P. Patto to refer for our consideration a question of law as follows:

Whether the Court has a general inherent power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings.

The applicants were charged before the Magistrate’s Court, Kampar on 22 April 1987 with separate offences under s. 27(5)(a) punishable under s. 27(8) of the Police Act. No. 41 of 1967; Mr. Karpal Singh for having participated in an assembly in a public place without a licence from the officer-in-charge of police district, Kampar and Mr. Patto for convening an assembly in a public place without a licence from the officer-in-charge of police district, Kampar. The offences were alleged to have been committed on 30 August 1984.

At the hearing before the Magistrate on 18 July 1989, the applicants raised a preliminary objection contending that the proceedings against them amounted to oppression and in all circumstances of the case the prosecution was oppressive and repugnant to the good administration of justice and that the Court had a general and inherent power to protect its

a process from abuse and that power must include a power to safeguard an accused person from oppression or prejudice and that accordingly the Court had the power to strike out proceedings.

b The Magistrate ruled that there was no provision in the Criminal Procedure Code which empowered the Court to make an order striking out proceedings on grounds submitted by them. She rejected the application and decided the trial should proceed. The applicants then asked that the matter be referred to the High Court for a revision. Peh Swee Chin J exercising his revisionary power found no merit in the submission made by the applicants. Accordingly, he ordered the case be remitted back to the Magistrate for it to be heard. The learned Judge nevertheless observed that the applicants were entitled to raise the question of oppression at the close of the prosecution case for the Court to decide.

c At the hearing before this Court, Mr. Karpal Singh submitted with added force the same argument canvassed in the Court below. He cited three cases in support of his contention, first, *PP v. Lee Tin Bau* [1985] and second, *Connelly v. DPP* [1964] 2 AER (HL) 401 and third, *DPP v. Humphrys* [1976] 2 AER 497. He argued that it is within the Court's inherent jurisdiction to strike out the proceedings. Mr. Stanley Isaacs appeared for the public prosecutor. He submitted that the chronology of events has shown that there was no oppression or harassment on the part of the prosecution. The delay was partly due to two main factors, namely, first the issue relating to setting aside of the warrant of arrest which led to an appeal to the Supreme Court (*P. Patto v. Chief Police Officer, Perak & Ors.*) [1986] CLJ (Rep) 208 (SC) and second, the detention of the applicants under the Internal Security Act. He maintained that the prosecution was diligently prosecuted.

e He also submitted that the Magistrate had no inherent power under the law to discharge in the sense of striking out proceedings. The nearest provision is s. 173(g) of the Criminal Procedure Code. Mr. Isaacs also drew this Court's attention to s. 5 and s. 376 of the Criminal Procedure Code as well as art. 145(3) of the Federal Constitution.

f He then invited this Court to consider *PP v. Zainuddin* [1986] CLJ (Rep) 232 (SC), a Supreme Court decision on the procedure in summary trials before the Subordinate Courts. And finally it was Mr. Isaacs' contention that the Court is not entitled to deny the right of the Public Prosecutor to prosecute as the discretion of the Public Prosecutor is absolute.

g Basically the sole issue before this Court revolves on a primary question of law and not of facts. The sole question that calls for determination (although couched vaguely) is whether a Magistrate's Court in criminal proceedings has power, inherent or otherwise to strike out proceedings against an accused person on grounds of oppression and/or harassment. Before we proceed to deal with this question, it seems proper that we look at the facts which Mr. Karpal Singh said constituted delay, harassment and an abuse of the process of the Court.

h The initial complaint which purportedly gave rise to the charges against both Mr. P. Patto and Mr. Karpal Singh was lodged on 30 August 1984 at Gopeng (Gopeng Report No. 1011/84). On 1 October 1985, pursuant to an application by the prosecution, warrants were issued by the Magistrate, Kampar for the arrest of the applicants. These warrants were however set aside by Anuar J at the Ipoh High Court on 26 October 1985.

i The complaint made against Mr. P. Patto was for convening an assembly in a public place without licence from the officer-in-charge of Police District (OCPD), Kampar and against Mr. Karpal Singh for having participated in an assembly in a public place without a licence from the OCPD Kampar.

It is revealed that Mr. P. Patto did apply for a licence to hold a solidarity dinner and lion dance on 31 August 1984 to the OCPD Kampar but was told by the OCPD Kampar by letter that his application had been forwarded to the Contingent Police Headquarters for consideration by the Chief Police Officer, Perak. The applicants were dissatisfied with the decision of the OCPD Kampar and therefore decided to file a writ for a declaration asking the High Court to decide as to who is the proper authority to issue the licence. The writ was filed in early September 1984. On 22 April 1985 Anuar J heard the case and refused to make the declaration sought by the applicants. He gave a written decision on 23 May 1985.

The applicants appealed to the Supreme Court against Anuar J's decision and the case was heard on 13 March 1986 in Penang and a written decision was issued on 8 April 1986 (*P. Patto v. Chief Police Officer, Perak & Ors.*) *supra*. In allowing the appeal, the Supreme Court held that:

- (1) the third respondent as the licensing authority under the provisions of s. 27(2) of the Police Act 1967 had abdicated his functions by transmitting the applications for consideration and determination by the first and second respondents;
- (2) the first respondent is the appellate authority to entertain an appeal against the refusal or the licence but in this case he purported to act at first instance by considering and determining the original applications, thereby depriving the appellant of his statutory right of appeal;
- (3) the refusal of the licences applied for by the appellant was therefore made by the wrong authority;
- (4) the intimation to the appellant of the refusal of the applications was made in a wholly unreasonable period of time so as to preclude any appeal by him against it.

On 17 March 1987, subsequent to the decision by the Supreme Court, the prosecution preferred separate charges against each of the applicants. The case came up for mention before the Magistrate on 22 and 24 April 1987. The applicants indicated that they would raise a preliminary objection on grounds of oppression and prejudice. The case was fixed for 4 June 1987. On that date Mr. Karpal Singh, for reasons known to him, withdrew his intention to raise the preliminary objections which is now repeated vigorously. The case was then postponed to 29 and 30 July 1987 for hearing but was postponed to 19, 20 and 21 November 1987 at the request of Mr. Karpal Singh who was engaged in the High Court, Kuala Lumpur on an election petition. On 19 November 1987 the Court was told that both the applicants were detained under the Internal Security Act. The case came up for mention on 18 March 1988 and 25 May 1988. As both applicants were still under detention, the Court postponed the case *sine die*. However on 1 December 1988 the prosecution informed the Court they would proceed with the case on 18 July 1989. At the hearing before the Magistrate, Mr. Karpal Singh appeared in person and also represented Mr. P. Patto.

At the hearing, he raised the preliminary objection which was overruled by the Magistrate. Subsequently the matter came up for revision by the Ipoh High Court. Following the decision of Peh Swee Chin J the point of law was referred to us under s. 66 of the Courts of Judicature Act 1964, for which we granted leave on 23 April 1990.

At the outset, we should express our disappointment at the vague wordings of the terms of reference. Whatever be the answer to the question, whether on grounds of harassment or frivolous proceedings that the case should be struck out, the matter is hardly of any public importance in our view. The phraseology "striking out" and any order for striking out in the legal context can be with or without liberty and such being the case what is the practical effect even if proceedings are struck out?

- a* However, we do not wish to quibble on what may turn out to be a purely academic exercise. The basic issue raised seems to be what powers a Court, especially at the first instance has, at a trial in the event of the prosecutor not being able to adduce all the evidence he wants or the defendant, by Counsel, prays orally to strike out proceedings or to acquit the accused on grounds of abuse or harassment and so forth. Should the Court acquit the accused or discharge him not amounting to an acquittal or strike out the case without hearing all evidence
- b* which could be adduced? In this regard all or most of the points have been thoroughly canvassed and decided by our Courts in the past. In the case of *PP v. Zainuddin, supra*, the issue for determination was:

In view of art. (3) of the Federal Constitution and s. 173(c) and (f) of the Criminal Procedure Code, whether it is right for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution.

- c* In that case, the answer was in the negative. In a similar reference, *Chu Chee Peng v. PP* [1973] 2 MLJ 35, the then Federal Counsel held that a discharge of the accused without hearing all the evidence which the prosecutor can adduce is legally sustainable but does not amount to an acquittal. Assuming the applicants have genuinely raised a novel point of law involving public interest, his main argument is rested on the common law enumerated in
- d* *Connelly v. DPP, supra*, and *DPP v. Humphrys, supra*. We are of the opinion, for the following reasons, that reliance on English cases is irrelevant for our purpose. In *Connelly's* case although the House of Lords agreed that the Court has no inherent power to prevent its process from being abused, differing views were expressed upon the scope of Courts' discretion. Until 1964 or thereabouts, the English Law was:

- e* Once an indictment is before the Court, the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment discloses an offence which a particular Court has no jurisdiction to try, per Lord Goddard CJ in *R. v. London Sessions (Chairman)*, *ex p. Downes* [1953] 37 Cr App Rep 148.

- f* However, Lord Pearce in *Connelly v. DPP, supra*, at p. 449, did not seem to accept the restrictive words of Lord Goddard CJ in *ex p. Downes*. He had this to say:

- g* The Court has, I think, a power to apply, in the exercise of its judicial discretion, the broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and creates abuse and injustice. *A fortiori*, when an order is made by consent of both parties that the indictment shall remain on the file and shall not be prosecuted without the leave of the Court, the matter is within the Court's judicial discretion. I certainly do not accept the Crown's contention, as I understood it, that the prosecution can thereafter proceed with the indictment even if the Judge in a proper exercise of his discretion refuses leave.

- h* Generally the procedure would appear to be that the defendant should apply by motion to a High Court to quash the indictment and he then has to prove either on the face of indictment or by an affidavit that the charge has been preferred without jurisdiction or has a substantial and apparent defect. We are not aware of any Court acting merely on the oral statement of a Counsel.

- i* Perhaps it is appropriate that we now pause to consider the constitutional consequence of relying on the English Common Law concept. Unlike, UK, the Constitution of the Federation which is a written law is specifically declared to be supreme law of the land. Also, it is to be

noted that UK has no criminal procedure code as enacted by our Legislature. For our immediate purpose we wish to refer to art. 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the Court's. The reasoning and logic behind such contention is well illustrated in the cases of *PP v. Lee Tin Bau*, *supra*, *Long bin Samat v. PP* [1974] 2 MLJ 152, *PP v. Datuk Harun bin Haji Idris & Ors.* [1976] 2 MLJ 116, *Poh Cho Ching v. PP* [1981] CLJ (Rep) 229. In the circumstances it is superfluous to reiterate the same points.

Another relevant consideration is our Criminal Procedure Code and its relationship with present English Common Law. The Criminal Procedure (Amendments and Extension) Act 1976, which came into force on 9 January 1976 is applicable to the whole of Malaysia, amending and codifying the previous separate legislations. The Code, as its name suggests was intended to be an exhaustive pronouncement of the criminal procedure. Section 5 of the Code is indicative of the principles to be applied by local Courts. This section provides for the English Law relating to criminal procedure to be applied when there does not exist any special provision on the matter either in the Code or any other existing law. English Law is applicable insofar as it does not "conflict or be inconsistent with this Code and can be made auxiliary thereto." The pronouncement and effect of the Code leave no *lacuna* under normal circumstances.

Section 173 of the Criminal Procedure Code stipulates the whole procedure in summary trials in the subordinate Courts including Magistrate's Courts. The opening para. (a) provides that the Court should ensure the proper framing of the charge, which must be explained to and understood by the accused before his plea is taken. The next para. (b) relates to convictions upon a plea of guilty. Then para. (c) directs that when an accused claims trial the Court shall hear "all such evidence" as may be produced in support of the prosecution.

In our considered view, the expression "all such evidence" is not confined to evidence which is available to the prosecution but which could not be produced for unavoidable reason at a specific date of hearing forming part of the trial. The term "all such evidence" is to be given a broad interpretation and should also include that evidence which can be produced at the continued hearing of the trial on a future occasion. Paragraph (d) guides the function of the Court to issue summons. Paragraph (e) confirms the traditional right of the accused to cross-examine witnesses against him. The criterion of acquittal or conviction is stated in next para. (f).

The following para. (g) is the crucial one for discussion in this case. The Court may discharge the accused (not acquit) if the Court considers the charge to be groundless. The Magistrate will have to record the reasons for his decision. If he discharges there is nothing to prevent the prosecution recharging the accused. It may be that the reason for the discharge may be that the Magistrate finds he has no jurisdiction or the charge does not disclose any offence known to Penal Code or other written law. The only circumstances under which an accused can be acquitted are those in para. (f) and when the prosecution offers no further evidence because it feels that the prosecution case has collapsed prematurely. There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though postponements are needed. If any party feels that the charge and consequent proceedings are illegal on the face of record, which we feel is rare, his remedy is to take up appropriate proceedings before a High Court to quash the charge and whole proceedings producing evidence to the satisfaction of the trial Judge

- a* to adopt such a case. It is absurd and against common sense to believe that the Legislature ever expected members of the subordinate judiciary to exercise such vast powers, trespassing into the public prosecutor's area.

- b* On the other hand, as an alternate remedy an aggrieved party may make appropriate representations to the Public Prosecutor for redress against alleged illegality. Such instances are not envisaged normally as public prosecutors and their representatives are expected to perform their function diligently, honestly, impartially in the public interest.

- c* In this reference we are not concerned with other paragraphs of s. 173. Our considered opinion is that the English doctrine of inherent jurisdiction is hardly applicable in subordinate Courts but the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused. As an instance of High Court invoking the doctrine of inherent power, we are aware of the instance referred to in *PP v. Lee Tin Bau*, *supra*. The circumstances of the case referred to therein were manifestly different and the Counsel's plea was supported by the evidence of the accused and the Judge's own investigation. There is hardly any room for transplantation of any English practice or other systems of law in the Magistrate's Court under the Criminal Procedure Code.

- d* In matters like criminal law of a purely domestic nature, our view is that the Court will only exercise inherent powers where there is miscarriage of justice. The Courts must be careful that the decision is not in conflict with the intention of the Legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the Legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the Court cannot act outside those powers and conditions.

- e* Before we decide this reference, we direct our attention to the implication of the facts in this case. It is quite obvious to us that whatever be the deeper reasons behind the delay, certainly the prosecution did not contribute to such delay. There is no evidence by any stretch of imagination that the Attorney-General or the prosecution acted in a spirit of harassment against the accused at all. We also like to say that there are no circumstances whereby the issues of *autrofois* acquit or convict and estoppel arise.

- f* In all the factual and legal circumstances we have already explained, we are left with no choice but to answer in the negative to the question posed to us, however badly it is framed. To the specific question:

- g* whether the Court has a general inherent power to protect its process from abuse to safeguard an accused person from oppression or prejudice by striking out frivolous proceedings,

- h* we answer "No" in the specific circumstances of the facts of the case under reference. We feel that the question is ambiguous. Therefore, our answer is not to be construed as limiting the constitutional function of the Courts. Among other things, it is questionable what is meant by the term "Court" as inherent powers are normally exercised by High Court and not Magistrate's Courts. The word "Court" is not specified in the question as to which particular structure the poser refers. Another question is why the question refers to "striking out" only specifically omitting other prerogative remedies. It is also not clear at what stage the applicants expect the Court to exercise its powers. Is it at the beginning of the case or after all prosecution evidence is adduced as Peh Swee Chin J indicated when the matter came before him by way of revision? We do not feel that Court should answer questions hypothetically and *carte blanche*. To avoid any doubt in future, we should clarify that we

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have not and will not abdicate our responsibility to act as a watchdog within constitutional limits to ensure that any authority do not act *ultra vires*. Legislature when creating Codes, can only foresee the most natural and ordinary events and no rule can regulate for all the time and for all the circumstances to protect citizens against all modes of inconvenience and discomfort which are infinite in number. In the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not possess the powers to do right and to undo wrong in the course of administration. We therefore feel that in law there is no obstacle for the case against the accused to be continued in the normal manner. At the same time, under the particular circumstances obvious from the records, the Attorney General may, a matter entirely for him alone to decide, consider exercising his discretion to enter a *nolle prosequi* in view of the delay and other circumstances. Insofar as this Court is concerned, we have no power vested in us to interfere with his discretion.

Also found at [1991] 2 CLJ 1458

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